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Van Waters & Rogers Inc.
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FILE COPY

July 15, 1999

Mr. Jamie Sikorski, Manager
RCRA Compliance Unit
U.S. Environmental Protection Agency
1200 Sixth Avenue, MS WCM-126
Seattle, Washington 98101

Re: Notice of Request for Dispute Resolution
Van Waters & Rogers Inc.
3950 Northwest Yeon Avenue
EPA ID No. ORD 00922 7398
Administrative Order on Consent (RCRA Docket No. 1087-10-18-3008)

Dear Mr. Sikorski:

This letter and attachments constitute Van Waters & Rogers Inc.'s (VW&R) notice of and request for Dispute Resolution pursuant to Paragraph 44 of the above-referenced RCRA Consent Order. Specifically, VW&R disputes the U.S. Environmental Protection Agency's (EPA) disapproval of certain elements of VW&R's proposed Interim Corrective Measures (ICM) and determination regarding future groundwater cleanup levels at the Facility. This notice of dispute resolution is being provided in accordance with EPA's July 1, 1999 extension granted to VW&R to file such notice by July 16, 1999.

VW&R believes the determinations set forth in EPA's June 17, 1999 letters regarding the Revised ICM Conceptual Design and Proposed Cleanup Level Determination Approach are arbitrary and capricious and/or not supported by substantial evidence. Accordingly, VW&R invokes the Consent Order's Dispute Resolution process to meaningfully discuss and ultimately resolve these issues which, despite our previous correspondence and discussions with EPA, have not been satisfactorily addressed.

The determination and disapproval issued by EPA which form the basis for invoking the Dispute Resolution process are contained in the following four letters issued by EPA to VW&R on June 17, 1999:

- *Summary of April 13, 1999 Meeting Agreements*
- *Response to Agreement Letter Dated May 18, 1999*
- *Technical Memorandum - Proposed Cleanup Level Determination Approach*
- *Revised Interim Corrective Measure Conceptual Design*

Copies of the four EPA letters are attached as Exhibit A.

Although VW&R is in substantial agreement with EPA's position and determination of most aspects of the ICMs proposed for the north and south portions of the facility and for calculating cleanup levels for the final corrective measure, we strongly disagree with the determinations made by EPA in its June 17 letters to: (1) require short-term secondary air emission controls for the groundwater air stripper ICM and (2) establish "target cleanup levels for the VW&R Facility at the Maximum Contaminant Levels (MCLs) for all contaminants in the groundwater that are at concentrations above the background." Consistent with the Consent Order's Dispute Resolution process, the remainder of this document provides VWR's specific objections and the bases for these objections.

SHORT-TERM AIR EMISSION CONTROLS FOR ICM

The conceptual design for the ICMs at the north and south ends of the facility includes the treatment of groundwater containing volatile organic compounds (VOCs) using air stripping technology. VW&R has proposed to operate the air stripper without emission controls during the *interim* period between ICM construction and final remedy implementation. EPA's June 17 letter addressing the ICM groundwater air stripper requires VW&R to equip the air stripper with "a secondary treatment system to prevent the cross media transfer of contaminants from soil and groundwater to air." Although EPA's position is purported to be based on EPA policy, as shown below, EPA has consistently and repeatedly approved groundwater air strippers in the North Portland area without secondary air treatment.

The groundwater air stripper proposed by VW&R will be operated in accordance with the following parameters:

- The total quantity of VOC emissions from the proposed air stripper would be approximately 2.2 tons/year, well below the applicable State of Oregon limits of 10 tons/year, and also below levels previously approved by EPA at other RCRA corrective action and Superfund sites in Oregon and Washington.

- The duration the air stripper would operate without emission controls would be limited to the time from ICM startup until implementation of the final corrective action that has not yet been determined for the Facility. It is therefore unknown whether emission controls may be likely or required for the final corrective action, or even whether the ICM groundwater air stripper system will be integrated into the final corrective measures for the Facility.

VW&R has previously provided EPA with this and additional technical and regulatory information in the March 22, 1999 letter *Revised ICM Conceptual Design and Responsiveness Summary to USEPA Comments*, attached as Exhibit B, and during several

meetings and conference calls. EPA's June 17, 1999 correspondence does not directly address the technical issues raised in VW&R's March 22 letter or in the meetings. Although EPA's June 17, 1999 letter (Re: Revised Interim Corrective Measure Conceptual Design) included a restatement of Region 10 policy which "actively discourages cross-media transfer of contaminants", it is clear that this policy does not blanketly prohibit VOC air emissions from a groundwater air stripper.

EPA recently provided VW&R a copy of the 1989 EPA National Guidance adopted by EPA Region 10 entitled "Control of Air Emissions from Superfund Air Strippers at Superfund Goundwater Sites" (OSWER Directive 9355.0-28, June 15, 1989), attached as Exhibit C. EPA's reliance on this policy would require VW&R to incur significant and temporary operational costs, estimated to be in excess of $190,000 per year associated with secondary air emission controls for the ICM. Yet in less than two years, the ICM may be entirely replaced by another final corrective measures at the Facility. VW&R believes that secondary treatment is an unnecessary burden not required by applicable state law, EPA policy or EPA precedent. First, the policy, whether or not adopted by EPA Region 10, is merely guidance, and not an agency rule or regulation. It is also over ten years old and while still in effect, must be read in conjunction with EPA's more recent guidance regarding RCRA ICMs in EPA's May 1, 1996, *Advanced Notice of Proposed Rulemaking (ANPR) regarding Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities*. 61 FR 19446-47. Indeed, EPA's determination to allow VOC emissions at the other RCRA and Superfund sites listed below acknowledges this fact and highlights the arbitrariness of EPA's position with respect to the VW&R ICM.

Perhaps even more important, however, is the fact that the policy cited by EPA actually supports VW&R's position because it refers to additional guidance to establish VOC emission limit goals, entitled "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations" (May 1988 Office of Air Quality Planning and Standards (OAQPS)). As explicitly stated in the OSWER policy relied upon by EPA in this case:

> The OAPS guidance indicates that *the sources most in need of controls are those with an actual emissions rate in excess of 3 pounds per hour (lb/hr) or 15 lb/day or a potential (i.e., calculated) rate of 10 tons per year (TPY) of total VOCs.* The calculated rate assumes 24-hour operation, 365 days per year. Regions should note that control levels are applied on a facility basis.

"Control of Air Emissions from Superfund Air Strippers at Superfund Groundwater Sites" (OSWER Directive 9355.0-28, June 15, 1989), at page 3 (emphasis added).

It is thus clear that EPA policy does not actually prohibit cross-media transfer of contaminants from soil and groundwater to air, but rather establishes certain limitations on such air emissions. In this case, the threshold air emissions levels established in EPA's policy are well above those emissions proposed by VW&R. As stated, the calculated VOC emissions rates for the ICM groundwater air stripper will be no more than 2.2 tons/year, clearly within the guidelines established in the EPA policy relied upon by EPA Region 10 in this case. This rate of VOC emissions is also far below applicable Oregon law and there is simply no technical or regulatory support for EPA's position that air emission controls must be included in the ICM from the time of startup.

This is in fact confirmed by VW&R's review of the Oregon Department of Environmental Quality ("DEQ") and EPA Region 10 records, which reveal that air emission controls do not appear to have been required for any air stripper in eastern Multnomah County used in a corrective action under RCRA, CERCLA, or their state counterparts. Randy Bailey, an air contaminant discharge permit writer for DEQ's Northwest Regional Office, confirms that to his knowledge air strippers in this area have not been required to have emission controls.

VW&R has identified the following sites within the Portland area where cross media transfer was part of either final or interim corrective actions:

- The Boeing Portland facility, Gresham, Oregon, which is performing corrective action under a Section 3008(h) Consent Order with EPA Region 10. (See EPA, Proposed Statement of Basis for the Boeing Portland Facility Troutdale Gravel Aquifer, p. 10, Feb. 1997, attached as Exhibit D.) Mr. Bailey stated in a recent phone conference that the Boeing stripper currently emits 2.6 tons/year VOCs.

- Swift Adhesives site, 18408 San Rafael Street, Portland, which is performing remedial action under a consent order with DEQ. (See DEQ, Record of Decision for Swift Adhesives, May 10, 1994, attached as Exhibit E.) DEQ applied the CERCLA guidance on "Control of Air Emissions from Superfund Air Strippers at Superfund Groundwater Sites" (OSWER Dir. 9355.0-28) as a "relevant and appropriate" requirement in deciding that controls were not needed. (See Swift Adhesives Feasibility Study, Table 2-1, p. 2-5, table only attached as Exhibit F.)

Both the Boeing and Swift Adhesives air strippers were in operation prior to the redesignation of the Portland area from nonattainment to attainment for the ozone NAAQS. 62 Fed. Reg. 27204 (May 19, 1997). Under the OSWER air emission policy cited by EPA, air strippers in nonattainment areas are more likely to require controls. However, EPA and DEQ apparently decided that the emissions from air strippers did not contribute sufficiently to ozone nonattainment to require controls. More to the point, EPA

and DEQ implicitly decided in adopting the Portland area's ozone maintenance plan in 1997 that it was not important to control such small sources of VOCs.

In EPA's June 17, 1999 letter discussing the revised ICM conceptual design, EPA responded to VW&R's identification of the Tulalip Landfill Superfund site as an example of precedent for cross-media transfer. Although VW&R's additional research has revealed the two comparable Portland sites which were not required to treat air emissions from their groundwater air stripper systems, VW&R believes that EPA's attempt to distinguish the Tulalip Landfill site from the VW&R Portland site is also inappropriate. Even though the majority of the waste in the Tulalip Landfill is construction debris and the remedy included the infrastructure for active gas treatment, the final Record of Decision allowed for an estimated 8 million pounds of methane and another 8 million pounds carbon dioxide[1] (both of which are "greenhouse gases") to be vented to the atmosphere without treatment *specifically because* they were below the applicable local or state air emission standards[2]. If the predicted emissions had exceeded the standards, active gas treatment would most likely have been required.

As previously noted, the quantity of emissions at the VW&R facility are much lower both in terms of estimated annual emission rates and the duration of the proposed emissions; at Tulalip the predicted 16 million pound per year emission rate for methane and carbon dioxide could continue for decades without requiring treatment whereas the VW&R ICM system would only operate without controls for a few years at most. Finally, the fact that the Tulalip ROD would require active emissions control should these standards be exceeded[3] directly parallels the situation at the VW&R facility. If EPA's concerns are related to "air problems in many areas, global impacts now being attributed to hydrocarbon and chlorinated organic releases, and the availability of effective vapor treatment technologies," then the approved *final* remedy at the Tulalip Landfill site should be of much greater concern.

Accordingly, VW&R believes that EPA should approve start up of the ICM air stripper with no emission controls. This will not only result in faster control and remediation of contaminated groundwater, but will also allow VW&R and EPA to focus on the final corrective measures and media cleanup levels for the Facility. The ICM is not a final remedy and any decision by EPA not to require treatment of air emissions now is temporary, until a final remedy is selected. If EPA requires construction of an ICM with emission controls at this time, before the specifics of the final corrective action are known, VW&R runs a significant risk of having to significantly modify or even replace an

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[1] Harding Lawson Associates. 1994. *Geotechnical Investigation and Landfill Gas Evaluation Report, Tulalip Landfill Remedial Investigation/Feasibility Study, Snohomish County, Washington.*

[2] United States Environmental Protection Agency Region 10. March 1996. *Record of Decision - Tulalip Landfill Superfund Site Interim Remedial Action, Marysville, Washington.* Pages 37, 40.

[3] *Ibid.* Page 65.

expensive control system within several years of constructing it without any significant benefit to the environment.

USE OF MCLS FOR GROUNDWATER CLEANUP LEVELS

As part of the corrective measures study (CMS) for the site, VW&R submitted a technical memorandum describing the approach to calculating cleanup levels to EPA on January 28, 1998. EPA provided comments on this technical memorandum on January 15, 1999. VW&R provided a detailed response to these comments in a letter dated February 17, 1999. The major issue left unresolved by this series of communications was the future beneficial use of groundwater that would be used to determine a risk-based cleanup level. VW&R's position was that based on all of the existing information related to historic, current, and future land and water use, there did not appear to be any current or future beneficial use of the groundwater beneath the VW&R Facility. EPA's position was that "usable groundwater" should be returned to "their maximum beneficial uses whenever practicable." EPA further commented on the potential applicability and relevance of State of Oregon regulations and guidance for evaluating beneficial uses of groundwater. These issues were discussed at length in our early March 1999 meeting at EPA at which VW&R agreed to provide EPA with supplemental information regarding the evaluation of beneficial uses of groundwater.

VW&R supplied extensive and detailed supplemental information in the April 27, 1999 letter entitled *Groundwater Beneficial Use Addendum to the Proposed Cleanup Level Determination Approach Technical Memorandum,* attached as Exhibit G. This addendum provided detailed information on the federal and state regulations, policy, and guidance related to evaluating beneficial uses of land and groundwater. The addendum also went through an exhaustive evaluation of historic, current, and future land and water use. This evaluation, which is based on documented site conditions and land and water use programs, clearly supports the conclusion that, at a minimum, there is no future potable use of the groundwater in the area surrounding the VW&R site.

In EPA's June 17, 1999, response to this addendum, EPA again maintains the position that groundwater cleanup levels should be determined based on *assumed* residential exposure scenarios and that exceptions to this only be made for "extenuating circumstances." Later in the June 17, 1999, EPA makes reference to an unreferenced "long-standing EPA policy to protect groundwater as a valuable resource whenever practicable." Finally, the June 17 letter requires that VW&R utilize MCLs as groundwater cleanup levels beneath the site.

EPA did not address any of the pertinent regulatory or technical guidance and policies provided by VW&R. The regulatory, policy, and guidance issues discussed by

VW&R remain valid and EPA's exclusive reliance on the single policy of returning groundwater to its "maximum beneficial uses whenever practicable" is, in VW&R's opinion, neither compelling or controlling. The policy states that groundwater in an area should be returned to *its own* maximum beneficial use, not the maximum beneficial use of groundwater in general or of groundwater elsewhere. EPA has yet to address the overwhelming evidence (not assumptions) presented by VW&R that the groundwater beneath and around the site has not, is not, and will not be used as a source of potable water – regardless of the contaminants from the VW&R Facility. EPA is using the policy to *assume* a condition that is not supported by any of the available facts.

As noted in the April 27 addendum, the May 1, 1996 Advance Notice of Proposed Rulemaking (ANPR) states that "when available media cleanup standards are used (e.g., MCLs, state cleanup standards), the assumptions used to develop the standardized cleanup values *should be consistent with the site specific conditions at the facility in question"* (61 FR 19449; emphasis added). Clearly, the application of MCLs at the VW&R Facility, located in the middle of the NW Yeon Avenue industrial corridor, is inconsistent with the site-specific conditions at this time and in the foreseeable future.

Elsewhere in the June 17 letter, EPA references the ANPR's caution against "automatically restricting assumptions of future land use to extrapolation of the current use or relying only on designated zoning or industrial use codes to establish land use assumptions." VW&R has not done this. VW&R's evaluation takes into account all available information when determining future land use, including growth management planning documents, zoning information, and historic and current land use patterns. EPA fails to recognize that both RCRA corrective actions and CERCLA remedial actions often employ the use of institutional controls to restrict public access to contaminated soils and consumption of contaminated groundwater. If this were not the case, every CERCLA and RCRA site in the country would have to achieve a health-based MCL or soil action level regardless of whether there was a likelihood of future public exposure. Accordingly, VW&R believes that EPA should first consider adopting Alternate Concentration Limits and/or institutional controls for the VW&R Facility in lieu of simply adopting MCLs which are impracticable and unnecessary given that the groundwater is not and will not be used for public consumption.

Furthermore, EPA seems to make a direct connection between potential changes in land use to changes in groundwater use. While a relationship between the two can exist, the fact that a "change in business ownership, business expansion, additions of office buildings, additions of day care centers and the like" may occur does not mean that it is any more likely that groundwater in the area will be used as a potable water supply. Based on the detailed information contained in the Regional Water Supply Plan planning document regarding future water supply plans and the hydrogeological and chemical information provided regarding the suitability of the groundwater for potable use (all of which are

provided in VW&R's addendum) there is simply no basis to make the assumption that groundwater will be used as a source of drinking water in the unlikely event a change in land use occur.

Contrary to what is inferred in EPA's June 17, 1999 letter, the use of non-drinking water assumptions to establish cleanup levels is not unknown or even uncommon. In fact, as part of EPA's July 1999 RCRA Cleanup Reforms press announcement, EPA will be developing new guidance on "the role of groundwater use in RCRA corrective Action." As described by EPA:

> This guidance is intended to provide more certainty about cleanup objectives and expectations with respect to groundwater remediation. It will include recommendations on how to account for current and reasonably expected uses of groundwater when implement interim and final RCRA corrective action remedies.

EPA RCRA Cleanup Reforms, Faster, Focused, More Flexible Cleanups (EPA 530-F-99-018, July 8, 1999), attached as Exhibit H.

The fact that EPA is developing this guidance is significant because EPA would not even develop or issue guidance on "how to account for current and reasonably expected uses of groundwater" if MCLs were always applicable based on EPA Region 10's assumptions. Indeed, issuance of such guidance by EPA recognizes that there is a continuum of reasonably expected uses of groundwater and an appropriate (and hence different) groundwater cleanup level for such reasonably expected uses.

Similar to the VOC emission treatment issue, VWR's research has also disclosed several sites located in industrial areas of Portland which have not been required to meet MCLs, including:

- Rhodia Suttle Road facility, North Marine Dr., Portland, for which DEQ is proposing groundwater cleanup levels for the shallow aquifer based on protection of surface water because "continued industrial use of the property is a reasonably likely future use." (See DEQ Staff Report, Recommended Remedial Action Rhodia Suttle Road Facility, June 3, 1999, pp. 4-2, 7-1, 7-2, and 7-5, attached as Exhibit I.)

- Swift Adhesives site (discussed above) for which cleanup goals have been set for DCE based on a 1 in 10,000 cancer risk level and for TCE based on a 1 in 1,000,000 cancer risk level assuming an industrial worker exposure scenario.

- McCormick and Baxter Creosoting Company Portland Plant, a CERCLA site, which set groundwater cleanup levels based on protection of the Willamette River due to the technical impracticability of meeting MCLs. (See EPA and DEQ, Record of Decision, McCormick and Baxter Creosoting Company Portland Plant, March 1996, attached as Exhibit J). Although this site involves wood treating contaminants, the "impracticability" rationale also applies to the Portland Facility.

Overall, VW&R still believes very strongly that the regulatory framework at both the federal and state levels and *all* available site-specific information support the conclusion that groundwater beneath the site is not a source of potable water and in fact has no likely beneficial future uses at all. To assume a residential land use scenario and further assume that groundwater will be used as a drinking water source is not supported by any of the facts or EPA policies and site specific determinations by EPA, and goes far beyond the level needed to be protective of human health and the environment, that has resulted in many of the statutory and regulatory reforms of recent years.

Finally, EPA's determination regarding groundwater cleanup levels is premature at this time because there has not been a determination for final corrective action by EPA that takes into account the final remedy threshold criteria and five balancing criteria required for RCRA corrective action as set forth in the ANPR. 61 FR 19449. The determination of a media cleanup standard, such as for groundwater, can only be made by EPA after applying the four remedy threshold criteria and five balancing criteria. With respect to the VW&R facility ICM, EPA has made no such determination and it is inappropriate and therefore arbitrary for EPA to adopt MCLs for groundwater cleanup at the facility.

EPA's policy for corrective action is that media cleanup standards (and levels) should "reflect the potential risks of the facility and media in question by considering the toxicity of the constituents of concern, exposure pathways, and fate and transport characteristics." 61 FR 19449. In this case, EPA has not identified or finally determined appropriate media cleanup standards for the VW&R Portland facility. Rather, until EPA considers all of the remedy threshold and balancing criteria, including cost and technical practicability, it is not appropriate – and is in fact arbitrary and capricious- for EPA to require or impose groundwater MCLs as a media cleanup standard.

SUMMARY

For the reasons discussed, VW&R believes that EPA's disapproval of VW&R's proposed groundwater air stripper ICM without secondary VOC emissions treatment and determination to require MCLs as the groundwater cleanup level for the Facility is not supported by the policies cited by EPA, other applicable agency RCRA policy and prior

EPA determinations at similar RCRA and CERCLA sites in the north Portland area. Accordingly, VW&R believes that EPA's determination with respect to these two issues is arbitrary and capricious, and not supported by substantial evidence and should be set aside. VW&R therefore seeks a determination by the EPA Region 10 Regional Administrator that it may proceed with its proposed groundwater air stripper ICM and the development of risk-based groundwater cleanup standards at its Portland Facility in accordance with applicable EPA policy.

Thank you for your attention to this matter. We look forward to meeting with you as required by the Consent Order. In the meantime, if you have any questions, please do not hesitate to contact me.

Sincerely,

Wayne Grotheer, by ℔

Wayne Grotheer, P.E.
Vice President

cc: Allan Bakalian
George Sylvester
Dan Balbiani, EMCON
Brian O'Neil, EMCON